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No. 90-1086

Supreme Court, U.S.  
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**In the Supreme Court of the United States**

OCTOBER TERM, 1990

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CALIFORNIA ASSOCIATION OF THE  
PHYSICALLY HANDICAPPED, INC., PETITIONER

v.

FEDERAL COMMUNICATIONS COMMISSION

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ON PETITION FOR A WRIT OF CERTIORARI  
TO THE UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

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**BRIEF FOR THE RESPONDENT IN OPPOSITION**

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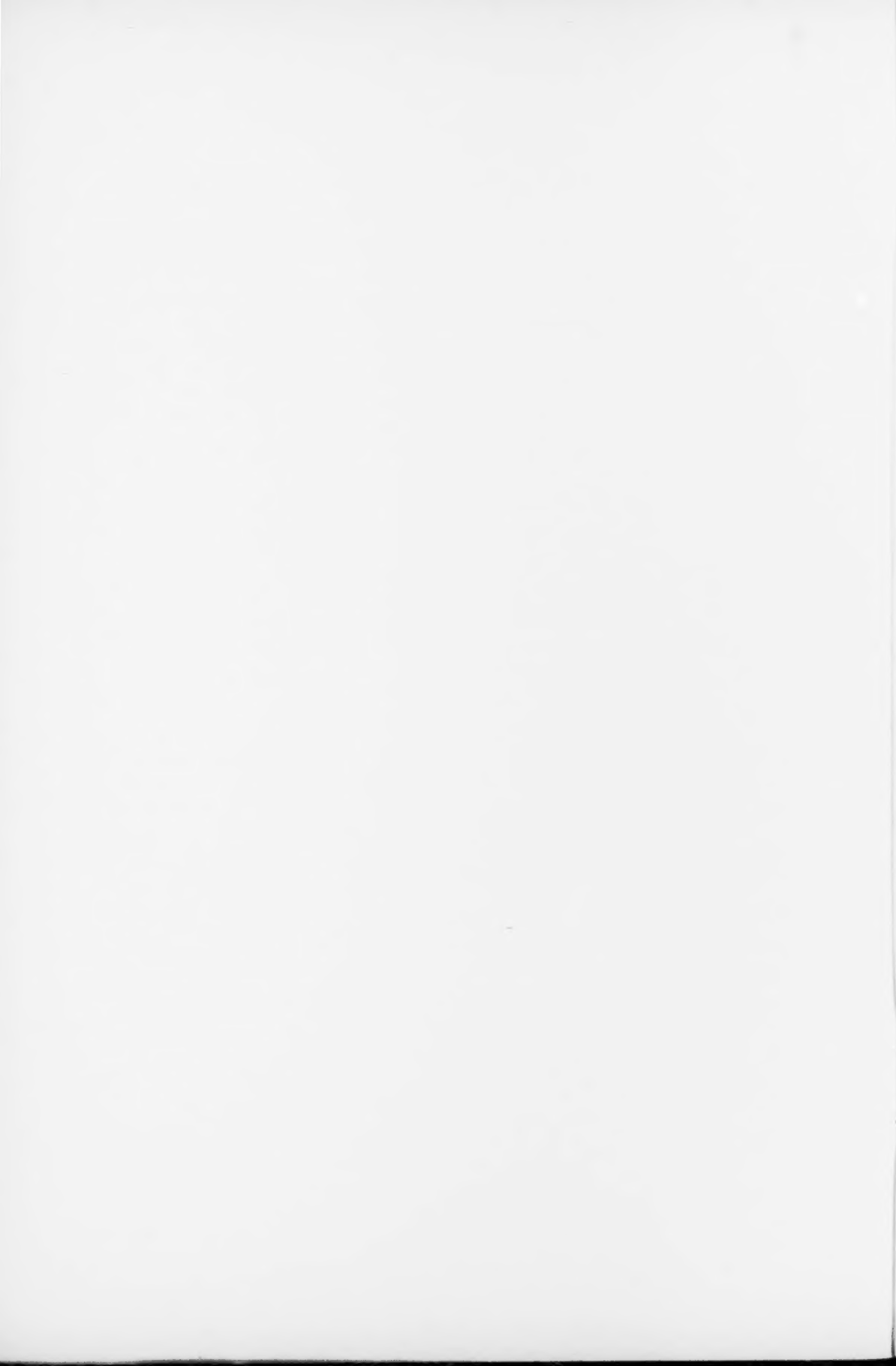
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### **QUESTION PRESENTED**

Whether the court of appeals correctly dismissed on res judicata grounds petitioner's challenge to the order of the Federal Communications Commission.



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## **OPINIONS BELOW**

The opinion of the court of appeals (Pet. App. 1a-3a) is unreported, although the judgment is noted at 905 F.2d 1540 (Table). The report and order of the Federal Communications Commission (Pet. App. 4a-66a) are reported at 2 FCC Rcd 2199.

## **JURISDICTION**

The judgment of the court of appeals was entered on June 22, 1990. A petition for rehearing was denied on September 5, 1990. Pet. App. 67a. On November 23, 1990, Justice O'Connor extended the time within which to file a petition for a writ of certiorari to and including January 3, 1991.

The petition for a writ of certiorari was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

### STATEMENT

1. Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. 794, prohibited discrimination on the basis of handicap in programs that receive "federal financial assistance." By its terms, the Act did not "impose any new enforcement obligation on the Federal Communications Commission." *Community Television of Southern Calif. v. Gottfried*, 459 U.S. 498, 509 (1983). Moreover, as this Court recognized, receipt of an FCC license did not otherwise subject broadcasters to the Act's requirements. *Id.* at 509-510.<sup>1</sup>

In amending the statute in 1978, Congress extended the nondiscrimination mandate of Section 504 to "any program or activity conducted by any Executive agency." Rehabilitation, Comprehensive Services, and Developmental Disabilities Amendments of 1978, Pub. L. No. 95-602, Tit. I, § 119, 92 Stat. 2982 (codified at 29 U.S.C. 794).

2. In 1987, after an extensive rulemaking proceeding, the Commission adopted regulations to implement the 1978 amendments to the Rehabilitation Act. Pet. App. 4a-66a. As the Commission explained:

Briefly, the rules prohibit discrimination on the basis of handicap in programs or activities conducted by the Federal Communications Commission. The rules thus affect Commission practices with respect to employ-

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<sup>1</sup> To the extent that some non-commercial educational broadcast stations may be subject to the Rehabilitation Act as a result of receiving federal grants for programming or capital construction, the funding agency — rather than the FCC — is responsible for enforcing compliance with Section 504. *Gottfried*, 459 U.S. at 509-510.

ment, access to FCC facilities, procurement policies, participation by individuals with handicaps in agency proceedings, and licensing policies for individuals with handicaps. The regulations set forth standards for what constitutes discrimination on the basis of physical or mental handicap, provide definitions for the terms individual with handicaps and qualified individual with handicaps, and establish a complaint mechanism for resolving allegations of discrimination.

*Id.* at 5a-6a.

The Commission rejected the position espoused by petitioner, California Association of the Physically Handicapped, Inc., and other organizations, that the activities of FCC licensees should be subject to the Act as amended in 1978. Pet. App. 24a-28a. The Commission noted that the language of the statute refers only to activities conducted by government agencies, and that this category does not include activities of private entities licensed by the government — an interpretation confirmed by the applicable legislative history. Moreover, the Commission pointed out, the model regulation promulgated by the Department of Justice reflected this limited application of the statute. *Id.* at 24a-25a.<sup>2</sup> Accordingly, the Commission's regulations

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<sup>2</sup> The President had specifically authorized the Department of Justice to coordinate the implementation and enforcement of Section 504 of the Rehabilitation Act. Exec. Order No. 12,250, 3 C.F.R. 298 (1981), reprinted in 42 U.S.C. 2000d-1 note; see *Greater Los Angeles Council on Deafness, Inc. v. Community Television of Southern Calif.*, 719 F.2d 1017, 1022 (9th Cir. 1983), cert. denied, 467 U.S. 1252 (1984). Under that mandate, the Department of Justice developed prototype regulations that provided that Section 504, as amended, did not apply to activities conducted by licensees of federal agencies. The Department of Justice and other departments and agencies later adopted regulations that followed the prototype regulations. See 51 Fed. Reg. 22,880, 22,884, 22,898 (1986); *California Ass'n of the Physically*



expressly provided that “the programs or activities of entities that are licensed or certified by the Commission are not, themselves, covered by this part.” *Id.* at 54a; see 47 C.F.R. 1.1830(b)(6).

The Commission also rejected as “beyond the scope of this proceeding” proposals made by petitioner and other organizations that the agency use its general authority under the Communications Act to require television stations to provide captioned programming and include the physically handicapped in their equal employment opportunity programs. Pet. App. 25a.<sup>3</sup> In addition, the Commission noted

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*Handicapped, Inc. v. FCC*, 840 F.2d 88, 93 & n.10 (D.C. Cir. 1988) (*CAPH IV*).

The Department of Justice regulations, for example, address the question of what constitutes activities “conducted by” federal agencies under Section 504, and expressly provide that the statute and implementing regulations are inapplicable to “the programs or activities of entities that are licensed or certified by the agency.” *Enforcement of Non-discrimination on the Basis of Handicap in Federally Conducted Programs*, 49 Fed. Reg. 35,724, 35,735 (1984). The regulations apply only to such activities as employment, public access to agency facilities, and participation in agency proceedings. *Id.* at 35,725. As the D.C. Circuit has pointed out:

Pursuant to section 504, the Justice prototypes and the other agencies’ regulations were submitted to the authorizing congressional committees, which registered no objection.

*CAPH IV*, 840 F.2d at 93 n.10; see 49 Fed. Reg. 35,724 (1984).

<sup>3</sup> As this Court has explained, “captioning”

refers to any of several technologies \* \* \* that project written text onto a television image so that deaf viewers receive information that is communicated to others by the soundtrack.

*Community Television of Southern Calif. v. Gottfried*, 459 U.S. 498, 501 n.3 (1983). “Open” captioning appears on all television sets tuned to the captioned program. “Closed” captioning appears only on those television sets equipped with special decoders. Most captioned programming is of the latter type.

that to the extent petitioner and others contended that the agency must adopt regulations to that effect, "these same arguments have been raised repeatedly before the Commission, the courts of appeals and the Supreme Court and have been rejected in every instance as without legal basis." *Id.* at 25a-26a; see, e.g., *Gottfried, supra*; *California Ass'n of the Physically Handicapped, Inc. v. FCC*, 721 F.2d 667 (9th Cir. 1983) (*CAPH I*), cert. denied, 469 U.S. 832 (1984).

3. Before the Commission issued its final order in the rulemaking proceeding, petitioner and others launched a challenge to the Commission's practices in this area before the District of Columbia Circuit. In particular, petitioner contended that the Commission, in considering applications for license renewals and transfers, must take into account the extent to which broadcasters caption television programs for hearing-impaired viewers and whether the broadcasters have an equal opportunity program covering the handicapped. In March 1988, the court of appeals rejected that challenge. *California Ass'n of the Physically Handicapped, Inc. v. FCC*, 840 F.2d 88 (D.C. Cir.) (*CAPH IV*). The D.C. Circuit held that

[petitioner's] continued attempts to force the FCC to impose captioning and hiring requirements in proceedings involving licensing renewals and transfers are simply inappropriate, and the FCC was well within its statutory authority in adopting a policy of summarily dismissing [petitioner's] petitions.

*Id.* at 97.<sup>4</sup>

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<sup>4</sup> The court of appeals pointed out that petitioner had conceded that "the primary object of [its] petition[ ] to deny is to force the Commission to adopt minimum captioning requirements for its licensees," and "to change its licensing policies prospectively with regard to . . . equal employment opportunities for handicapped people."

*CAPH IV*, 840 F.2d at 96.

4. In June 1990, the Ninth Circuit denied the petition for review of the Commission's substantive rulemaking proceeding filed by petitioner in this case. Pet. App. 1a-3a. In the court of appeals, petitioner contended that the Rehabilitation Act and the Communications Act "compel the FCC to require licensees to close caption all prime-time programming." *Id.* at 2a. The court held, however, that the D.C. Circuit's recent decision in *CAPH IV*, 840 F.2d at 91-95, "is res judicata as to this issue." Pet. App. 2a (citing also *CAPH I*, 721 F.2d at 669-670). Petitioner had also argued that the Commission must "require licensees to implement equal employment opportunity programs for the handicapped." Pet. App. 2a-3a. The court rejected that argument, concluding that *CAPH IV*, 840 F.2d at 95-96, "is res judicata as to this issue as well." Pet. App. 3a (citing also *CAPH I*, 721 F.2d at 669-670).

### ARGUMENT

1. Petitioner contends (Pet. 10-17) that the court of appeals erroneously dismissed on res judicata grounds its substantive challenge to the FCC's order regarding program captioning and equal employment opportunity programs. That contention is without merit. The issues petitioner seeks to raise in this proceeding have already been litigated and decided in prior litigation between the parties.<sup>5</sup>

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<sup>5</sup> The term "res judicata" is sometimes used to refer only to the doctrine of claim preclusion and sometimes, as in the Restatement (Second) of Judgments (1982), to embrace both claim preclusion and issue preclusion. See *id.*, ch. 3, Introductory Note, at 131. In this case, we believe the court below used the term "res judicata" in its broader sense. As we argued in the court of appeals, see Resp. Supp. C.A. Br. 2-5, the doctrine of issue preclusion bars relitigation in this proceeding of the issues adjudicated by the D.C. Circuit in *CAPH IV*. (We also argued that, as a result of the decision of the Ninth Circuit in *CAPH I*, this action was barred by the doctrine of claim preclusion. See Resp. Supp. C.A. Br. 5-6.)

In the court below, petitioner contended that Section 504 of the Rehabilitation Act mandates that the FCC “require closed captioning of television programs to enable hearing impaired viewers to enjoy the benefits of television.” Pet. C.A. Br. 1; see Pet. App. 2a. But petitioner had previously raised that precise contention before the D.C. Circuit in *CAPH IV*.<sup>6</sup> And the D.C. Circuit squarely rejected petitioner’s argument, concluding that the 1978 amendment extending Section 504 to “any program or activity conducted by” a federal agency imposes obligations on the FCC’s own activities, but not those of the broadcasters themselves. The D.C. Circuit therefore upheld the Commission’s interpretation – that the captioning obligation petitioner sought to have the FCC impose concerned the activities of broadcasters, not those of the FCC. *CAPH IV*, 840 F.2d at 93-94.

In the court below, petitioner also contended that Section 504 of the Rehabilitation Act, as amended, “compel[s] the FCC to require licensees to implement equal employment opportunity programs for the handicapped.” Pet. App. 2a-3a. Petitioner had raised that same EEO argument before the D.C. Circuit in *CAPH IV*. See 86-1321 Pet. C.A. Br. 28-32, *CAPH IV*. And in that case, the D.C. Circuit rejected that argument as “no more convincing” than petitioner’s call for program captioning. *CAPH IV*, 840 F.2d at 96.

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<sup>6</sup> See 86-1321 Pet. C.A. Br. 20, *CAPH IV* (“the 1978 Amendment to the Rehabilitation Act imposed a direct obligation on the Commission to consider the needs of deaf and hearing impaired people”); *id.* at 24 (“the agency must determine whether the station has failed to caption an adequate amount of its programs to enable hearing impaired viewers to benefit from television”); see also 86-1321 Pet. C.A. Reply Br. 1, *CAPH IV* (“the primary object of [the] petition[ ] to deny is to force the Commission to adopt minimum captioning requirements for its licensees”).

On the record presented, the court of appeals' dismissal of petitioner's contentions on res judicata grounds is therefore unexceptionable. Nonetheless, petitioner contends that "res judicata cannot be used to bar a party to a rule-making procedure from seeking and obtaining judicial review in accordance with 5 U.S.C. § 702." Pet. 13. But to apply res judicata is not to "bar" judicial review; the doctrine simply precludes petitioner from raising particular issues before the reviewing court when those issues had been previously raised and rejected in earlier judicial proceedings involving the same parties.

2. Petitioner also renews its contention (Pet. 17-21) that—assuming the doctrine of res judicata does not preclude it from raising the issue—the Commission's regulations promulgated under the Rehabilitation Act must include provisions for program captioning and equal employment opportunity programs. That contention is meritless, as the courts of appeals have concluded. See *CAPH IV*, 840 F.2d at 91-96; *CAPH I*, 721 F.2d at 669-670. There is therefore no need for this Court's further review.<sup>7</sup>

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<sup>7</sup> Congress recently amended Sections 303 and 330 of the Communications Act of 1934, 47 U.S.C. 303 and 330, to require that, as of July 1, 1993, large television sets sold in the United States must be equipped with circuitry compatible with closed caption programming. See Television Decoder Circuitry Act of 1990, Pub. L. No. 101-431, 104 Stat. 960-962. The FCC is in the process of drafting regulations implementing this legislation. See 6 FCC Red 449 (1991).

**CONCLUSION**

The petition for a writ of certiorari should be denied.  
Respectfully submitted.

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APRIL 1991

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\* The Solicitor General is disqualified in this case.